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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 457th MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 21 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

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The meeting was called to order at 9.45 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS
(continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 11

1. The CHAIRMAN invited the Commission to take up paragraphs 1 and 2 of article 11 together, since they dealt with comparable situations. He suggested that, for the sake of consistency with the wording of paragraph 2, the words "and the beginning" in paragraph 1 should be replaced by the words "or the beginning".
2. Mr. BHALA (United States of America) pointed out that in practice in the commercial world there was an average of one revocation order for every 30 amendments made to a payment order. He therefore suggested that a reference to amendments should be inserted in paragraphs 1 and 2 of article 11.
3. Mr. GREGORY (United Kingdom) said that, in view of the comment made by the United States representative, the Model Law should in principle deal with amendments. If a reference to amendments was inserted, however, it would be necessary to state what an amendment was and what a bank did when it received one. He suggested that, rather than embarking on such a change at the present late stage, the Commission should leave the article as it was in that respect and note that the Model Law did not deal with the question of amendments to payment orders.
4. He approved the Chairman's drafting suggestion. He drew attention to his Government's proposal in its written comments (A/CN.9/347, p. 62, sect. 25) that the term "payment date" in paragraph 2 should be replaced by the term "execution date". Since the meaning of the latter term had been extended to include the beneficiary's bank, it would be appropriate to make that change.
5. The United Kingdom proposal was adopted.
6. Mr. IWAHARA (Japan) agreed with the view expressed by the representatives of the United Kingdom and the United States of America that the Model Law should not overlook the question of amendments to payment orders. Since time was short, however, it might be best to leave the matter for interpretation.
7. Mr. ADEDIRAN (Nigeria) concurred. The sender had the right to amend a payment order before it was sent. At the present juncture it would be best to allow for the exercise of that right through interpretation of the Model Law.
8. Miss BOUM (Cameroon) said that if amendments of payment orders were more numerous than revocations, the Working Group must have discussed them. She wondered why the Working Group had not catered for them in the draft Model Law.
9. Mr. ABASCAL ZAMORA (Mexico) expressed concern at the idea that the problem should be left for interpretation. That could be taken to mean, for example, that the Model Law simply did not deal with amendments and that they were a matter for national legislation. Alternatively, the Commission might consider stating, on the lines of article 7(2) of the United Nations

(Mr. Abascal Zamora, Mexico)

Convention on Contracts for the International Sale of Goods, that matters not expressly dealt with in the Model Law would be dealt with in conformity with the general principles on which it was based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

10. Mr. BHALA (United States of America) said that, if the Commission decided not to include a reference to amendments in the Model Law, he would be satisfied if it was noted in a commentary to the instrument that the issue was important in the commercial world; and that, although it was not dealt with explicitly in the Model Law, the text contained nothing to preclude amendments being made to payment orders and might be considered to cover them.

11. The CHAIRMAN suggested that, for the time being, the Commission might proceed on the assumption that the Model Law would not refer to amendments to payment orders.

12. Mr. LE GUEN (France) observed that the Commission had rejected a proposal by the United States to insert a reference to amendments in article 2(j) (A/CN.9/SR.443, para. 22). He agreed with the view expressed on the subject by the United Kingdom representative.

13. Mr. HERZBERG (Observer for Israel), referring to paragraph 1, said that if a bank executed a payment order before the date of execution, he did not see how it could act on a revocation order, unless it was able to pass it on to an intermediate bank in the chain. It might be best if the paragraph referred simply to execution.

14. Ms. KOSKELO (Observer for Finland) suggested that it might be necessary to set a limit on amendments to payment orders. If an amendment entailed a very large increase in an order, it might cause difficulties for the bank concerned.

15. Mr. GREGORY (United Kingdom) said that the observer for Israel had raised an important point which deserved consideration. The Commission had not yet reached agreement on a definition of the term "execution date", but since article 10 now provided that execution must take place on the day an order was received or on the next day, the bank had a choice in the matter. For most purposes it would make sense if the execution date was defined as the date by which a bank was required to execute the payment order, which effectively would mean the later of the two days in question. That might, however, be unsatisfactory in the case with which article 11 was concerned. For example, a bank might execute a payment order on the day of receipt and receive a revocation order effected before the later of the actual time of execution and the beginning of the execution date; if the execution date was defined in the manner he had just described, the later of the two days would be the second day. Banks should not be discouraged from executing an order on the day of receipt where possible, but the fact that they might be required to act on a revocation order effected as late as the second day could have that result. He was therefore uncertain whether the rule in paragraphs 1 and 2 of article 11 was appropriate for the Model Law.

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16. Mr. LE GUEN (France) said that he did not entirely agree with the United Kingdom representative's reasoning. There was nothing in article 11 to provide that a bank should automatically carry out a revocation order. If a bank received a revocation order before the execution date for the payment order, it would be free to decide if it had a reasonable opportunity to act or not. If a bank which had executed a payment order on the first day received a revocation order after execution, it could not reasonably be expected to execute the revocation order. He suggested that the problem might be solved simply by deleting the words "and the beginning of the execution date" at the end of paragraphs 1 and 2.

17. Mr. GREGORY (United Kingdom) said that the reason for the inclusion of the words "and the beginning of the execution date" was to ensure that a revocation order received before the beginning of the execution date was properly effected. Otherwise a bank could claim that it had not had a reasonable opportunity to act because it had already executed the payment order.

18. Mr. ADEDIRAN (Nigeria) agreed with the representative of France. The problem with revocation was that once a payment order had been executed in fact, it could not be revoked. If the payment order had been executed on the day it was received or the following day, the revocation order would not be valid. It would be better to provide simply that the revocation would not be valid after the actual time of execution.

19. Mr. GREGORY (United Kingdom) said he felt sure that the idea which the Commission wished to express was that the bank must have a reasonable opportunity to act before the later of the actual time of execution of the payment order and the earliest date on which it was required to execute it under article 10. That might be the day of receipt or, if the circumstances in subparagraphs (a) and (b) of article 10(1) applied, a later date.

20. Mr. HUANG Yangxin (China) said that there was a close link between paragraphs 1 and 2 of article 11 and paragraph 5 of the article. The reason for the mention of the actual time of execution and the beginning of the execution date was that they applied mainly to a fixed date for execution as stipulated in the payment order. Under paragraph 5, if a receiving bank executed a payment order before the stipulated payment date and then received a revocation order, it would not be entitled to reimbursement; even if it had made the payment before the execution date, it would still have to execute the payment order. It might therefore be advisable to consider wording which would allow the receiving bank to execute a payment order early, without a stipulated execution date; in other words, the actual time of execution mentioned in paragraphs 1 and 2 would apply only to payment orders which specified a future date of execution.

21. Mr. LOJENDIO OSBORNE (Spain) said that the French representative had proposed the deletion from article 11 of the reference to execution date. A receiving bank late in executing a payment order was liable under article 16; if there was a revocation order in those circumstances, his understanding was that acceptance of the French proposal - leaving only the notion of effective execution in article 11 - would mean that consequences would arise under article 11(5).

22. Mr. CRAWFORD (Canada) considered that the French suggestion would upset the balance of article 11. The existing text defended both the interests of the sender, in guarding against premature execution, and the right of the receiving bank to have a reasonable opportunity to take action.

23. In response to a suggestion by the Chairman, the Commission agreed to maintain the balanced approach to revocation orders which was expressed in the existing text of paragraphs 1 and 2 of article 11.

24. The CHAIRMAN called for comments on the use of the term "execution date" in article 11.

25. Mr. SCHNEIDER (Germany) considered that the term "execution date" meant the time when an obligation fell due, but that in construing it a distinction should be drawn between that time and the time when it was fulfilled. He therefore proposed the replacement of the words "execution date" by the words "time when a bank may execute".

26. The CHAIRMAN said that in his view the German suggestion was inconsistent with the decision which the Commission had just taken.

27. Mr. GREGORY (United Kingdom) thought that might not be the case. Acceptance of the German suggestion would exclude premature execution. It would mean that the latter part of article 11(1) would indicate that the receiving bank should have a reasonable opportunity to act before the later of the actual time of execution and the earliest date when it was permitted to execute under article 10. If the receiving bank had not executed the payment order when the revocation order arrived, the point raised by Spain would be taken care of. If it had executed the payment order, the revocation would not be applicable. If the payment order specified a later payment date, the bank would not have been allowed to execute the payment order on the day of receipt but would have been obliged to execute it on the date specified. The solution seemed perfectly satisfactory.

28. Ms. KOSKELO (Observer for Finland) suggested that it might be clearer to use the words "the later of the actual time of execution and the day on which the payment order should have been executed under article 10(1)(a) or (b)".

29. Mr. HUANG Yangxin (China) suggested that the paragraph might refer to the period between the time when the receiving bank was entitled to execute the payment order and the day on which it was obliged to execute it.

30. Mr. DE BOER (Netherlands) said he believed that banks were always permitted to execute payment orders early if no execution date was specified.

31. Mr. BHALA (United States of America) said that the question being discussed was extremely technical and consequently it was often difficult to understand the implications of every proposal. He believed that the original text catered in a perfectly satisfactory manner for the point under discussion. To illustrate that, he had worked out a hypothetical case involving a four-day period: on day one the receiving bank received a payment order with an indication that day four should be the execution date. On day two the receiving bank executed the order - prematurely. On day three the

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sender sent a revocation order, day four still being the execution date. With the present wording of article 11, the revocation order would be effective. Under article 10(1) as redrafted by the Commission, a receiving bank was required to execute a payment order on the day on which it received it or, at the latest, on the following day. The hypothesis he had described would be valid with article 10(1) so worded.

32. Mr. GREGORY (United Kingdom) said that he was not sure whether the final point made by the previous speaker was correct. His delegation's problem was with the term "execution date", which seemed inadequate for the situation in which an order was received by a bank which wished to execute it on the same day. If it did so and a revocation order arrived on the second day, it was not clear to him if the beginning of the execution date would be the first day or the second. If the term "execution date" meant "date by which execution must take place", which would seem sensible, the time concerned would be the end, not the beginning, of the period.

33. Mr. SCHNEIDER (Germany) said that he wished the text to embody the idea that a bank was permitted, but not obligated, to execute the payment order during a given period.

34. Mr. YIN Tieou (China) proposed that the text of paragraphs 1 and 2 of article 11 should remain as they were. If no execution date was specified in the payment order, that date should be the date of receipt of the payment order or the following day. Either was legally acceptable.

35. The CHAIRMAN recalled the Commission's decision, in regard to article 10(1), that the day on which a payment order should be executed was the day of its receipt or the following business day. In principle, execution should take place on the same day, not the "first" or the "second day"; it would, he believed, weaken that principle if reference was made to the first or the second day of execution in article 11.

36. Mr. GREGORY (United Kingdom) said that the matter under discussion involved the whole concept of execution and had implications for provisions of the text other than article 11. He regretted that he could not agree with the Chairman's view.

37. Mr. CONOBY (United Kingdom) said that, if a bank saw any possibility that it might receive a revocation order after it would normally have executed the payment order, it would delay execution; consequently, as his delegation had indicated earlier in the meeting, acceptance of the rule in paragraphs 1 and 2 of article 11 would create a bias towards later execution. If a bank executed a payment order on the day of receipt, and a revocation order was received on the following day, the revocation order would be ineffective.

38. Mr. CRAWFORD (Canada) said that, in considering the meaning of the term "execution date", the Commission must take into account the need to adhere to the principle of same-day execution. He hoped that the comments by the United Kingdom delegation did not imply that premature execution should be encouraged.

39. Mr. LE GUEN (France) said that there was a substantial difference between the English and French versions of article 11(1). He considered the French version more satisfactory.
40. Mr. SOLIMAN (Observer for Egypt) said that the French version seemed to be much clearer than the English version, in the light of the Arabic version.
41. The CHAIRMAN invited the Commission to consider the following amendment to article 11(1): to replace the words "before the later of the actual time of execution and the beginning of the execution date" by the words "before the actual time of execution or the beginning of the day on which the payment order ought to have been executed under article 10(1)(a) or (b), if later". Unless he heard any objection, he would take it that the Commission accepted his suggestion and referred article 11(1) to the Drafting Group as reproduced in document A/CN.9/344, with that change.
42. It was so decided.
43. Mr. HEINRICH (Bank for International Settlements) said that the Commission might have overlooked one question relating to article 11, namely the principle, accepted by the Working Group and mentioned in the Secretariat's commentary (A/CN.9/346, p. 64, para. 2), that a payment order was irrevocable. The Model Law should therefore limit the possibility of revocation and make clear what the time-limit was for revocation. One possibility mentioned by a central bank that had submitted comments to the Bank for International Settlements was to state that revocation would no longer be possible after the account of the originator had been debited.
44. Mr. ABASCAL ZAMORA (Mexico), reverting to the question of amendments to payment orders, said that UNCITRAL had a reputation for formulating viable legal instruments. His delegation believed that the Model Law would not fall into that category if it failed to refer to amendments to payment orders. The Commission might analyse the subject - which the Working Group had not done to any great extent - and seek a suitable course of action; if it decided that the Model Law would not deal with amendments, that should be stated explicitly and it should be made clear that such matters should be left to national legislation. It might, as he had suggested earlier in the meeting, formulate a provision along the lines of article 7(2) of the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Sales Convention). It would be regrettable, and bad law, if the Model Law remained silent on the question of amendments. If that proved to be the decision of the Commission, his Government wished that view to be reflected in the Commission's report.
45. Mr. BURMAN (United States of America) said that he associated himself with the views expressed by the representative of Mexico. In the real world of banking, amendments to payment orders were far more common than revocations. Most of the fundamental matters related to credit transfers were addressed in the Model Law, so there was no reason to exclude amendments.
46. Mr. GREGORY (United Kingdom) agreed that a general provision on interpretation similar to article 7(2) of the Vienna Sales Convention would be

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a good way of dealing with the matter. It should be included in article 18 or a later article. He did not, however, see any need to include a specific reference to amendments in article 11, since the general provision would encompass amendments. The fact that a matter was not explicitly addressed in the Model Law did not mean that it was excluded from its operation; on the principle embodied in article 7(2) of the Vienna Sales Convention, the Model Law would apply to all matters related to credit transfers. Such matters clearly included amendments to payment orders. That could, perhaps, be explained in the report of the Commission.

47. Mr. RENGGER (Germany) said the question of amendments to payment orders deserved full discussion. The Commission must first decide whether or not the Model Law should explicitly address the matter and, if not, whether it was necessary to include in the Model Law a general rule similar to article 7(2) of the Vienna Sales Convention.

48. Mr. POTYKA (Observer for Austria) agreed that the matter was important and deserved careful consideration, even if the final decision was to leave the Model Law silent in respect of amendments to payment orders.

49. Mr. KAKOLECKI (Observer for Poland) endorsed the views expressed by the representative of Mexico. He was also impressed by the point made by the representative of the United States of America about the greater frequency of amendments. Why should the Model Law deal only with the less frequent occurrence, revocation?

50. Mr. ADEDIRAN (Nigeria) wondered if the Commission was trying to introduce too much detail into the Model Law. Amendments to payment orders were a practical problem between sender and receiving bank. He saw nothing against permitting amendments if they were reasonable and within the power of the receiving bank to implement. He could accept a provision to that effect if it was felt necessary.

51. Mr. KOMAROV (Union of Soviet Socialist Republics) said that a provision similar to article 7(2) of the Vienna Sales Convention would be a useful way of meeting the concerns of the representative of Mexico, as the representative of the United Kingdom had demonstrated.

52. Mr. CRAWFORD (Canada) said that, to put matters in perspective, while amendments might be more common than revocations, payment orders as such were vastly more frequent than amendments. The inclusion of a general provision similar to article 7(2) of the Vienna Sales Convention was a good suggestion, but he would prefer the Model Law to indicate explicitly that amendments would be treated in the same way as revocations.

53. Mr. PELICHET (Hague Conference on Private International Law) warned the Commission of the risk implicit in transposing a provision such as article 7(2) of the Vienna Sales Convention from a convention to a model law, since the circumstances envisaged in the two kinds of instrument were not the same.

54. Mr. FUJISHITA (Japan) said he preferred that the Model Law should remain silent on the matter. Perhaps later a general provision on interpretation might be inserted.

55. Mr. HEINRICH (Bank for International Settlements) said that an amendment could be viewed as a revocation of a payment order and the creation of a new one.

56. Mr. BOSSA (Observer for Uganda) supported the explicit reference suggested by the representative of Canada.

57. Mrs. PETRE (Society for Worldwide Interbank Financial Telecommunications) said that the practice in her organization, SWIFT, was to treat amendments as both a revocation and a new payment order.

The meeting rose at 12.45 p.m.